IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-131

SEA-LAND SERVICE, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY MEMORANDUM

JOHN C. FRICANO
JOHN M. NANNES
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-131

SEA-LAND SERVICE, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY MEMORANDUM

---

1. For the first time in this litigation, the Government contends that original counsel produced privileged documents "knowingly and purposely." (Br. in Opp. at 1-2) This characterization of original counsel's actions is grossly misleading and unsupported by the record.

The relevant facts are established by the uncontroverted affidavit of original counsel. (JA 39-44) Original counsel believed that the "P" documents were privileged and intended to withhold them from production (JA 40), but they were inadvertently delivered to the Government. (JA 42) When the government attorney inquired whether

production of those documents had been intended, original counsel—believing the inquiry to be directed to different documents—mistakenly informed the Government that production had been intentional. (JA 43)

The Government's characterization of the production as "knowing and purposeful" is apparently based on the fact that the possibility of a mistaken delivery was called to the attention of original counsel and original counsel assured the Government that the production had been proper.[1] This fact fails to support the Government's characterization, however, since the record establishes that original counsel mistakenly believed that the Government was inquiring about other documents.

Original counsel believed that the "P" documents were privileged. The Government does not and cannot dispute the fact that original counsel intended to withhold the "P" documents from production, and the Court of Appeals specifically found that original counsel mistakenly assured the Government that production of the documents had been deliberate. (Pet. App. 4a-5a) Furthermore, upon discovering its error, original counsel notified the Government that the production had been inadvertent and mistaken. (JA 43, 121, 132) In these circumstances, it is disingenuous for the Government to argue that the controversy arises "simply because years later different counsel . . . have evaluated the privileged nature of certain documents differently." (Br. in Opp. at 5)

2. Sea-Land contends that the attorney-client privilege belongs to the client and not to the attorney. Accordingly,

[1] It is possible that the Government used the terms "knowingly and purposely" to mean that original counsel produced privileged documents, knowing them to be privileged. Sea-Land made no such suggestion in the courts below, and even the Government's authorities do not support the proposition that the privilege would be waived in such circumstances. VIII WIGMORE ON EVIDENCE §2326, at 633 n.2 (McNaughton rev. 1961). If the opinion of the Court of Appeals is susceptible to such an interpretation, then review is necessary to reject such an unwarranted construction.

the unauthorized actions of original counsel cannot constitute a waiver of the attorney-client privilege. The Government implicitly accepts Sea-Land's position when it admits that "an attorney's inadvertent disclosure of an otherwise confidential document for a short period of time might not waive the privilege." (Br. in Opp. at 6) Implicit in this concession is recognition that unauthorized disclosure by an attorney cannot waive the client's privilege. But, contrary to the Government's position, the length of time during which such documents are inadvertently disclosed is relevant only if the client is properly chargeable with a failure to exercise due diligence in asserting the privilege. Here, however, it is undisputed that original counsel deliberately kept the fact of the mistaken production from Sea-Land until December 1977, at which time the Company moved through present counsel to assert the privilege and take all possible steps to obtain return of the documents.

3. Although the criminal proceedings between Sea-Land and the Government have been completed, the Government has refused to return copies of the documents and has threatened to use them in administrative proceedings. Additionally, plaintiffs in private antitrust actions against Sea-Land are attempting to compel production of the "P" documents on the basis of the opinion below.[2] The opinion of the Court of Appeals is inconsistent with decisions in other Circuits, and review is

[2] The Government tentatively suggests that the present controversy may be moot "in light of the production of documents and the plea of nolo contendere." (Br. in Opp. at 5, n.3) Of course, if the controversy is moot, the proper disposition would be for this Court to summarily vacate the judgment and opinion of the Court of Appeals and remand the matter to the District Court with instructions to dismiss. *Great Western Sugar Co.* v. *Nelson*, 47 U.S.L.W. 3774 (May 29, 1979); *United States* v. *Munsingwear*, 340 U.S. 36, 39-40 (1950). Indeed, the *Munsingwear* rule is designed to prevent unfair collateral estoppel effects that might otherwise result from the judgment below.

necessary to vindicate the proposition that the attorney-client privilege belongs to the client and not to the attorney.[3]

Respectfully submitted,

JOHN C. FRICANO
JOHN M. NANNES
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
Suite 900
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 293-9233

Counsel for Petitioner
Sea-Land Service, Inc.

Dated: September 1979
Washington, D.C.

---

[3] The Government contends that contrary decisions in other Circuits rest upon the conclusion that the inadvertent disclosures resulted from accelerated discovery programs and thus are distinguishable from the present controversy. In point of fact, the record in this case demonstrates the difficulties encountered by original counsel in attempting to meet production deadlines imposed by the Government (JA 80-112), and in any event the District Court made no findings on this point whatsoever inasmuch as it believed that the physical act of production was sufficient to establish waiver. Additionally, it should be noted that the panel opinion in *International Business Machines Corp.* v. *United States*, 471 F.2d 507 (2d Cir. 1972), was vacated on grounds unrelated to the Panel's decision on the issue of waiver.